In an affidavit filed by Hiew Sit Sang the general secretary of the appellants states, inter alia, as follows:

> Pursuant to s 33(1) of the Industrial Relations Act 1967 (hereinafter referred to as 'the said Act') the applicants filed an application in the relevant statutory form for interpretation of art 34 of the Industrial Court Award No 54/81 and art 31 of the 1984 Collective Agreement in both of which award and collective agreement the applicants and the respondents were parties.
>
> Subsequently the respondents filed a statement in reply as directed by the Industrial Court.
>
> The matter was fixed for hearing on 7 September 1986 by the Industrial Court constituted by the learned President and a panel of three members. I was present in court on 7 September 1988 with the applicants' counsel.
>
> At the commencement of proceedings on 7 September 1988 the applicants' counsel pointed out to the court about the provisions of s 33(5) of the said Act as to constitution of the court as a preliminary requirement to be complied with before the court proceeded to hear the merits or demerits of the applicants' substantive application.
>
> The Industrial Court took note of this preliminary issue and then after a brief submission by counsel adjourned for about 30 minutes and ruled that the applicants' application is 'struck-off'.
>
> I verily believe that when the applicants' counsel asked for confirmation that the matter was being 'struck-off', the learned President of the court confirmed it and stated that the court's written grounds for the ruling will be given in due course.
>
> On 15 September 1988, the applicants' solicitors received the said written grounds of the court as Award No 234 of 1988 and dated 9 September 1988 dismissing the applicants' application.
>
> I am advised in law and verily believe that in making the said award the Industrial Court did not take into account matters it ought to have taken into account, instead took into account matters it should not have taken into account and thereby exceeded its jurisdiction and or acted without jurisdiction in particular:
>
> (a) misconstruing s 33 of the said Act and not taking into account the provisions of s 52(2) of the said Act;
> (b) misconstruing the provisions of s 33(5) of the said Act;
> (c) not according the applicants the right to be heard on the merits or demerits of the application in compliance with the principles of natural justice as enshrined in s 33(3) of the said Act before dismissing the said application.

Section 33(3) of the Industrial Relations Act 1967 reads as follows:

> The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.

At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of certiorari ought to have been given. In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted.

For these reasons we were of the view that the appeal should be allowed and the appellants be given leave to apply for an order of certiorari to quash the Industrial Court Award No 234 of 1988 dated 9 September 1988.

Appeal allowed.

Solicitors: *Lobo & Associates; RR Singham.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Choo Ching Hwa & Anor

SUPREME COURT (KUALA LUMPUR) —CRIMINAL APPLICATION NO 07-11-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND JEMURI SERJAN SCJJ
3 AUGUST 1990

Criminal Procedure —Question of law of public interest —Criminal breach of trust —Accused acquitted in session court —Appeal to High Court dismissed —Reference to Supreme Court —Application by public prosecutor for leave —Proof of dishonesty —Whether question of law of public interest arose during appeal and whether determination of the question affected the event of appeal —No evidence other than assertion of deputy public prosecutor —Courts of Judicature Act 1964, s 66(1)

The respondents in this case had been tried in the sessions court at Kuala Lumpur for criminal breach of trust under s 409 of the Penal Code. The respondents were acquitted without their defence being called. An appeal to the High Court was dismissed. The public prosecutor then applied for leave under s 66(1) of the Courts of Judicature Act 1964 to refer several questions of law to the Supreme Court. The questions all related to what in law amounts to dishonesty and whether in the context of the case dishonesty had been proved. No evidence was given, other than the assertion of the deputy public prosecutor, whether the questions were in fact that on which the learned judge decided the appeal. Neither the grounds of judgment of the

learned judge nor the notes of proceedings in the High Court were produced.

Held, dismissing the application:

(1) An applicant for leave under s 66(1) of the Courts of Judicature Act 1964 must satisfy the court that the question of law of public interest arose in the course of the appeal and the determination of the question had affected the event of the appeal.

(2) The notice of motion in this case was adjourned to another date to enable the applicant to provide the court with a written judgment of the learned appellate judge or if it is not available the certified notes of proceedings to indicate that the questions raised were actually determined and had affected the event of the appeal.

(3) In an application for leave under s 66 of the Act, the court should adopt an attitude of reluctance and be slow in granting leave. The basis for this attitude is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s 66(1) of the Act.

[Responden-responden didalam kes ini telah dibicarakan di mahkamah sesyen, Kuala Lumpur, atas tuduhan pecah amanah jenayah. Mereka telah dibebaskan tanpa diminta membela diri mereka. Rayuan terhadap pembelaan itu telah ditolak di Mahkamah Tinggi. Pendakwa raya kemudian memohon kebenaran dibawah s 66(1) Akta Mahkamah Keadilan 1964 untuk merujuk beberapa soalan undang-undang kepada Mahkamah Agung. Soalan-soalan itu semuanya berkaitan dengan soal apakah maknanya ketidakjujuran dan samada didalam konteks kes itu ketidakjujuran itu telah dibuktikan. Tidak ada keterangan diberi selain daripada penyataan penolong pendakwa, samaada soalan-soalan itu sebetulnya soalan-soalan yang menjadi asas keputusan yang ariff hakim yang memutuskan rayuan itu. Alasan kehakiman yang ariff hakim itu dan nota prosiding di Mahkamah Tinggi tidak dikemukakan.

Diputuskan, menolak permohonan:

(1) Seorang pemohon mendapat kebenaran dibawah s 66(1) Akta Mahkamah Keadilan perlu memuaskan mahkamah bahawa soalan undang-undang yang mempunyai kepentingan awam telah dibangkitkan didalam rayuan itu dan jawapan terhadap soalan itu telah menjejas keputusan rayuan itu.

(2) Notis usul didalam kes ini hendaklah ditangguhkan hingga suatu masa kemudian untuk membolehkan pemohon mengemukakan kepada mahkamah alasan bertulis oleh yang ariff hakim yang mendengar rayuan itu atau jika ia tidak didapati salinan nota prosiding yang diperakui untuk menunjukkan bahawa soalan-soalan yang dikemukakan telah sebetul dijawab dan jawapan itu menjejas keputusan rayuan itu.

(3) Didalam sesuatu permohonan mendapat kebenaran dibawah s 66 Akta itu mahkamah hendaklah mengambil sikap enggan dan tidak mudah memberi kebenaran. Asas sikap itu ialah untuk menjamin bahawa permohonan untuk rujukan itu tidak menjadi sebaliknya sebagai rayuan, yang mana bukan tujuan seksyen itu.]

Cases referred to

1 *Tan Yin Yen* v *PP* [1973] 2 MLJ 143 (folld)
2 *A Ragunathan* v *Pendakwa Raya* [1982] 1 MLJ 139 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 66
Penal Code s 409

Stanley Isaacs (Deputy Public Prosecutor) for the appellant.
Low Hop Bing for the first respondent.
Jagjit Singh for the second respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): In the notice of motion by the public prosecutor for leave under s 66(1) of the Courts of Judicature Act 1964 ('the Act') several questions, five in all, were posed for reference. All the questions originated from the appeal dismissed by the learned judge in the Kuala Lumpur High Court after hearing arguments on 17 February 1990. The respondents were jointly charged on 12 counts in the Kuala Lumpur sessions court for criminal breach of trust under s 409 of the Penal Code involving various sums of money. The respondents were acquitted by the sessions court without their defence being called.

In the affidavit of the learned deputy public prosecutor in support of the notice of motion he stated that arguments were heard by the learned appellate judge on the central question whether dishonesty had been proved before the learned sessions court judge. According to the learned deputy public prosecutor his submission on this issue was rejected both by the sessions court and the High Court. The five questions in respect of which leave was sought for reference all relate to what in law amounts to dishonesty in the context of the case, whether dishonesty is said to have been proved once it is proved that the loans were given without authority and that there was a loss to the person giving the loans and/or a gain to the person taking the loans.

Looking at those questions it would seem obvious to us that these are all bare questions, no doubt questions of law but without any evidence, other than the assertion of the learned deputy public prosecutor, whether they were in fact questions on which the learned judge of the High Court decided to determine the appeal. We were not provided with the grounds of judgment of the learned judge nor the notes of the proceedings in the High Court. The affidavit merely stated that these points were raised and argued before the learned judge.

The principles on which leave may be granted under s 66(1) of the Act have been settled. Apart from being a question of law of public interest, the other requirements of s 66(1) are that the question must have arisen in the course of the appeal, and more importantly, the determination of the question has affected the event of the appeal. Although s 66(1) of the Act says that the court shall on the application of the public prosecutor grant leave, the court should not just grant leave unless it is satisfied that the question was actually determined by the appellate judge and has affected the event of the appeal. It is common knowledge that various points may be raised in an appeal and submissions made thereon but it is not unusual that

although a number of legal issues were argued and submitted by counsel the judge may decide on one obscure point and decide the appeal solely on that point without considering the other issues raised in the appeal before him.

Therefore an applicant for leave under s 66(1) of the Act must satisfy the court that the question of law of public interest arose in the course of the appeal and the determination of that question had affected the event of the appeal. The easiest way to satisfy the court that this particular requirement of s 66(1) of the Act has been satisfied is to provide the court with the written judgment or grounds of decision of the learned judge or if it is not available to provide at least the certified notes of proceedings if it is clearly indicated therein that that particular point was in fact raised, determined and had affected the event of the appeal.

It hardly needs to be emphasized that in an application for leave under s 66 of the Act the court should adopt an attitude of reluctance and be slow in granting leave. This attitude was clearly indicated in *Tan Yin Yen* v *PP*[1] and *A Ragunathan* v *PP*.[2] The basis for this attitude is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s 66(1) of the Act.

For the above reasons the notice of motion was adjourned to another date to be fixed by the senior assistant registrar to enable the applicant to provide the court with a written judgment of the learned appellate judge or if it is not available, the certified notes of proceedings to indicate that the questions raised were actually determined and had affected the event of the appeal.

Under sub-s (2) of s 66, the application for leave shall be made within one month or such longer time as the Supreme Court may permit of the determination of the appeal to which it relates. In order to comply with this provision, the application for leave must be filed within one month or such longer period as the court may allow. However, if at the time of application the written judgment of the appellate judge or the certified notes of proceedings are not applicable, the affidavit supporting the notice of motion should, as a matter of procedure, state the unavailability of either document and that it will be filed as soon as it is available to enable this court to fix the date of hearing of the application.

Application dismissed.

Solicitors: *Low Hop Bing & Associates; Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22-267-89
EDGAR JOSEPH JR J
28 JUNE 1990

Administrative Law — Registration of trade unions — Trade union seeking to organize workers — Rival union obtaining registration by Director General of Trade Unions — Breach of rules of natural justice — Whether trade union should have been offered opportunity to make representations — Allegations of conspiracy — Whether proper procedure is to appeal against order for registration — Whether writ action against Director General of Trade Unions is proper — Jurisdictional error — Whether preclusive provisions of statute bar suit — Industrial Relations Act 1967, ss 9(4B)(b) & 11 — Trade Unions Act 1959

Civil Procedure — Appeal — Decision of Director General of Trade Unions — Provision in statute for appeal — Writ action commenced against Director General — Whether proper — Trade Unions Act 1959

Civil Procedure — Interlocutory injunction — Balance of convenience — Preservation of status quo — Hardship

Civil Procedure — Pleadings — Striking out — Principles applicable — Rules of the High Court 1980, O 18 r 19

Labour Law — Registration of trade unions — Trade union seeking to organize workers — Rival union obtaining registration by Director General of Trade Unions — Natural justice — Whether trade union should have been offered opportunity to make representations — Allegations of conspiracy — Whether proper procedure is to appeal against order for registration — Whether writ action against Director General of Trade Unions is proper — Breach of rules of natural justice — Jurisdictional error — Whether preclusive provisions of statute bar suit — Industrial Relations Act 1967, ss 9(4B)(b) & 11 — Trade Unions Act 1959

Words and Phrases — 'Frivolous and vexatious' — Rules of the High Court 1980, O 18 r 19

The plaintiff had served a claim for recognition on the second defendant pursuant to s 9(2) of the Industrial Relations Act 1967. The second defendant's objection addressed to the first defendant, the Director General of Trade Unions, resulted in a ruling by him that the plaintiff was competent to organize and represent the workers in the second defendant's factory other than those in certain excluded categories. The plaintiff also contended that it was competent to represent the workers employed by the third defendant. The second defendant had appealed to the Minister of Labour against the ruling. However, the plaintiff withdrew its claim for recognition addressed to the second defendant on the advice of the Director General of Trade Unions when a membership check carried out by him revealed that the plaintiff's members had not signed the membership forms. The plaintiff later complained to the Industrial Relations Department that the second defendant was trying to influence or instigate the plaintiff's members in the factory to resign from the plaintiff union, leading the department to act on the complaint. Subsequently, the plaintiff informed the Director General of Trade Unions that it was in the process of receiving applications